Supreme Court, U.S.
FILED
NOV 2 4 2003
OFFICE OF THE CLERK

(2)

No. 03-454

In the Supreme Court of the United States

RICHARD ALLEN ROSELL, PETITIONER

v.

PAT WOOD, CHAIRMAN, FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

CYNTHIA A. MARLETTE
General Counsel

SUSAN J. COURT
Associate General Counsel for General and Administrative Law

MORIA NOTARGIACOMO
WILBUR T. MILLER
Attorneys
Federal Energy Regulatory Commission
Washington, D.C. 20210

9 pp

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the court of appeals correctly affirmed the district court's dismissal of petitioner's complaint for failure to exhaust his administrative remedies as required by a collective bargaining agreement.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	6

TABLE OF AUTHORITIES

Cases:

Asociacion de Empleados Del Area Canalera v. *Panama Canal Comm'n*, 329 F.3d 1235 (11th Cir. 2003)	4
City of Monterey v. *Del Monte Dunes, Ltd.*, 526 U.S. 687 (1999)	4
Fidelity & Deposit Co. v. *United States*, 187 U.S. 315 (1902)	5
Mudge v. *United States*, 308 F.3d 1220 (Fed. Cir. 2002)	4
Statland v. *United States*, 178 F.3d 465 (7th Cir. 1999)	5
Wilderness Soc'y v. *Griles*, 824 F.2d 4 (D.C. Cir. 1987)	5
Williamson v. *Tucker*, 645 F.2d 404 (5th Cir.), cert. denied, 454 U.S. 897 (1981)	

Constitution and statutes:

U.S. Const. Amend. VII	4
Civil Service Reform Act, 5 U.S.C. 7121(a)(1)	4
Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*	3
Federal Arbitration Act, 9 U.S.C. 4	5

In the Supreme Court of the United States

No. 03-454

RICHARD ALLEN ROSELL, PETITIONER

v.

PAT WOOD, CHAIRMAN, FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The per curiam opinion of the court of appeals (Pet. App. 2a-3a) is unreported. The order and opinion of the district court (Pet. App. 7a-18a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 2003. The petition for rehearing was denied on June 27, 2003 (Pet. App. 1a). The petition for a writ of certiorari was filed on September 25, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a full-time, nonsupervisory, GS-13 auditor employed by the Federal Energy Regulatory

Commission (FERC) and a member of the American Federation of Government Employees (AFGE) Local No. 421, which has a labor management agreement (LMA) with FERC. Article 17 of the LMA sets out a grievance procedure that "shall be the exclusive procedure available to the Union and Bargaining unit employees for resolving grievances," with exceptions not relevant here. C.A. App. 74. The LMA defines a grievance as "a request for personal relief on any matter of concern or dissatisfaction to a bargaining unit employee, a group of bargaining unit employees or the Union." *Ibid.* The LMA further states that a grievance includes "any complaint * * * by any employee concerning any matter relating to the employment of the employee," and "any complaint * * * by any employee, or the Union, concerning * * * any claimed violation, misinterpretation or misapplication of any law, rule, or regulation affecting conditions of employment." *Ibid.*

In 2001, petitioner submitted to his supervisor requests for compensatory time for time spent traveling on days outside his basic work week. His supervisor denied both requests. Pet. App. 8a. Pursuant to Article 17 of the LMA, petitioner, through his counsel, submitted a grievance to the union to challenge the agency's decision not to grant his request for compensatory time. C.A. App. 129. On June 11, 2001, the union president responded to petitioner's counsel by memorandum that stated that petitioner had the right to choose representation other than the union and that, "where an employee selects representation other than a union representative, the union will: (1) monitor the case through the administrative process; (2) not be obligated to take the case to arbitration; and (3) not be obligated to pay attorney fees." *Id.* at 130. He further

noted that petitioner's grievance was "subject to the grievance procedure as set forth in Article 17 of the Labor/Management Agreement" and "[i]f you have any questions or need additional information, please call me." *Ibid.* On June 14, 2001, petitioner notified the union that he was withdrawing the complaint. *Id.* at 131.

2. On June 19, 2001, petitioner filed this suit on behalf of himself and purportedly similarly situated employees of the FERC alleging violations of the overtime pay provisions of the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.* In response to FERC's motion to dismiss on the ground that petitioner had failed to follow the grievance procedures contained in the LMA, petitioner argued that the district court could not properly rule on FERC's motion without discovery and an evidentiary hearing. The district court granted FERC's motion on the ground that petitioner had failed to follow the grievance procedures contained in the LMA. Pet. App. 12a-17a.

3. In an unpublished judgment, the court of appeals (Pet. App. 2a-3a) affirmed the district court's ruling, stating that "[f]or the reasons articulated by the district court, we agree that [petitioner] did not comply with the grievance procedures provided by the [LMA], as he was required to do under the Civil Service Reform Act, 5 U.S.C. § 7121(a) (1996)." *Id.* at 3a.

ARGUMENT

1. The court of appeals in an unpublished decision affirmed the district court's dismissal of petitioner's complaint because petitioner did not exhaust the negotiated grievance procedures provided in the LMA between petitioner's union and FERC. The LMA in this case unequivocally provides that it "shall be the

exclusive procedure available to the Union and Bargaining unit employees for resolving grievances," C.A. App. 74, and the district court found that "[petitioner] did not attempt to comply with the negotiated grievance process" in the LMA, Pet. App. 17a. The court of appeals accordingly correctly affirmed the dismissal of petitioner's complaint because petitioner did not follow the procedures set forth in the LMA. That fact-bound and unpublished decision does not warrant further review by this Court.*

2. Petitioner argues (Pet. 8-18) that this Court's review is warranted because he was allegedly deprived of his Seventh Amendment right to a jury trial. That contention lacks merit. The Seventh Amendment right to a jury trial does not apply to suits against the United States. *City of Monterey* v. *Del Monte Dunes, Ltd.*, 526

---

* In *Asociacion de Empleados Del Area Canalera* v. *Panama Canal Comm'n*, 329 F.3d 1235 (11th Cir. 2003) and *Mudge* v. *United States*, 308 F.3d 1220 (Fed. Cir. 2002), the courts of appeals rejected the contention that Section 7121(a)(1) of the Civil Service Reform Act (CSRA), 5 U.S.C. 7121(a)(1), which provides that the negotiated procedures in a collective bargaining agreement "shall be the exclusive administrative procedures for resolving grievances which fall within its coverage," bars a judicial remedy for grievances covered by the agreement. Neither of those decisions addressed the government's alternative contention that, irrespective of the CSRA, resort to a judicial remedy was foreclosed by the exclusivity provision of the collective bargaining agreement. The summary unpublished decision of the court of appeals below does not mention either *Panama Canal Comm'n* or *Mudge*, or indicate whether it was affirming the dismissal of petitioner's complaint because the CSRA foreclosed a judicial remedy or because *the LMA* foreclosed a judicial remedy. Nor did petitioner bring either decision to the attention to the court of appeals. Particularly because the LMA clearly foreclosed petitioner's suit, this case presents no occasion to determine whether the CSRA also foreclosed the suit.

U.S. 687, 719 (1999). It also does not prohibit the grant of summary judgment, *Fidelity & Deposit Co.* v. *United States*, 187 U.S. 315, 319-21 (1902), or a dismissal for lack of jurisdiction, *e.g.*, *Statland* v. *United States*, 178 F.3d 465, 472 (7th Cir. 1999).

Petitioner similarly erroneously argues (Pet. 10-14) that the Federal Arbitration Act afforded him a right to a jury trial. That Act only applies when a person is "aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration." 9 U.S.C. 4. The LMA arbitration provision here was never properly invoked. Pet. App. 17a. Furthermore, the remedy under the Act for a refusal to arbitrate is an order requiring the parties to go to arbitration, not a trial in district court on the underlying issues. 9 U.S.C. 4.

3. Petitioner also argues (Pet. 19-22) that the district court denied him due process in dismissing his complaint without affording him discovery and an evidentiary hearing. That claim too lacks merit. Petitioner received and took advantage of the opportunity to present affidavits and other evidence to the district court. His own submission, however, demonstrated that he had not followed the grievance procedures set forth in the LMA. Pet. App. 15a-17a. Presented with uncontroverted evidence that petitioner had failed to avail himself of the grievance procedures under the LMA, the district court correctly concluded that no further proceedings were necessary. See *Wilderness Soc'y* v. *Griles*, 824 F.2d 4, 16 n.10 (D.C. Cir.) ("[T]he plaintiff should have an opportunity to develop and argue the facts in a manner that is adequate in the context of the disputed issues and evidence."), cert. denied, 454 U.S. 897 (1981).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

CYNTHIA A. MARLETTE
General Counsel

SUSAN J. COURT
Associate General Counsel for General and Administrative Law

MORIA NOTARGIACOMO
WILBUR T. MILLER
Attorneys
Federal Energy Regulatory Commission

NOVEMBER 2003